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PANEL II

THE ROLE OF THE COMMITTEE AGAINST TORTURE IN PROVIDING ADEQUATE REPARATIONS TO VICTIMS

Remarks of Dean Claudio Grossman

BACKGROUND

In November of 2012, the Committee adopted General Comment No. 3.¹ In the 25 years of its existence, the Committee has adopted only two [other] general comments—very few in comparison to other committees. The Committee has only ten members, the smallest of all of the human rights treaty bodies, with a considerable workload. The Committee simply has not had the time to engage in standard-setting through general comments. However, it became necessary to adopt a General Comment on the scope of Article 14 that would assist States Parties, Committee Members, and others in applying the Convention.

A legal procedure loses legitimacy if it does not have a consequence. The Committee, both under the states' reporting system and the individual complaints procedure, required follow-up by states in accordance with Article 14, but was not specific in determining how to remedy a violation of the Convention. Through the adoption of General Comment No. 3, the Committee firmly established that redress encompasses restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition, giving clear guidelines as to the consequences of violations of the Convention.²

THE COMMITTEE'S CORE PRINCIPLES

In adopting General Comment No. 3, it was important for the Committee to lay down core principles. Amongst those principles is that economic compensation certainly plays a role in alleviating violations of human rights, and that compensation involves reparations for both material and moral damages, including pain and suffering.³ Still, anyone who has worked with victims knows that that is not enough. What victims want is justice, investigations, establishment of responsibilities, and punishment that is proportional to the offense. General Comment No. 3 reaffirms that prompt, effective and impartial investigation, prosecution and proportional punishment are required, and that amnesty laws are incompatible with the obligations laid down by Article 14.⁴

When human rights are violated, we are not dealing only with individual wrongs; thus, it is crucial for society at large to help reestablish the rule of law. Measures of satisfaction and guarantees of non-repetition are mandated by Article 14 of the Convention, and are essential forms of redress as states restore support for the rule of law.

General Comment No. 3 also considers the status of gender and vulnerable and marginalized groups, including indigenous populations and the poor.⁵ People are exposed to violations of human rights in different ways, and we need to recognize this in order to equalize compensation and measures of redress and reparations: There are special needs when we talk about vulnerable and marginalized groups.

Access to justice is a key procedural guarantee. Access to justice cannot be made conditional on the availability of resources. There are always opportunities and possibilities for society to do justice. In my own experience I have witnessed, time and again, situations of societies that, in spite of being poor, are extremely generous and express solidarity with those who have been badly affected by violations of human rights.

The concept of victim is also key. The victim is not only the person who has been subjected to torture, but their affected family members and dependents are victims as well. This concept of victimhood is not artificial. Anyone who doubts it has not been exposed to the children or spouses of individuals who have been disappeared. Human rights defenders also can be victims as they are continually subject to serious consequences for their actions. Accordingly, another important contribution of General Comment No. 3 is recognition of the legal duty to guarantee the security of victims and human rights defenders, and the importance of victims' participation and leadership, and the role of civil society as a whole, in the redress.⁶

LEGAL DEVELOPMENT THROUGH JURISPRUDENCE

The Committee built on its own jurisprudence in order to adopt this General Comment. For example, see *Gerasimov v. Kazakhstan* (2012).⁷ In this decision, the Committee records that Article 14 of the Convention recognizes not only the right to fair and adequate compensation, but also requires States Parties to ensure that the victim of an act of torture obtains redress.⁸ The redress should address all the harms suffered by the victim through the provision of restitution, compensation, rehabilitation of the victim, and measures to guarantee that there is no reoccurrence of the violation, while always bearing in mind the circumstances of the particular case.⁹ So this General Comment is not a result of the Committee against Torture suddenly learning the complexities of the law of redress, but the result of a process to codify and develop the practice of the Committee.

In the same decision,

the Committee considers that, notwithstanding the evidentiary benefits to victims afforded by a criminal investigation, a civil proceeding and the victim's claim for reparation should not be dependent on the conclusion of a criminal proceeding. It considers that compensation should not be delayed until criminal liability has been established. A civil proceeding should be available independently of the criminal proceeding and necessary legislation and institutions for such civil procedures should be in place. If criminal proceedings are required by domestic legislation to take place before civil compensation can be sought, then the absence or undue delay of those criminal proceedings constitutes a failure on behalf of the State party to fulfill its obligations under the Convention.¹⁰

The standard of proof for a domestic criminal prosecution is higher than for civil liability. In the Anglo-Saxon tradition, a criminal prosecution requires proof beyond a reasonable doubt, while civil liability requires a preponderance of the evidence. Torture does not take place in the presence of a public notary with witnesses; thus, if the required standard is reasonable doubt, it is impossible to prove state responsibility. In cases of gross and mass violations of human rights, presumptions are acceptable to prove an individual case of torture. In such a case, the burden of proof shifts to the state and the state can disprove the presumption by showing that torture did not take place.

Additionally in its decision on *Gerasimov v. Kazakhstan*, "the Committee emphasizes that disciplinary or administrative remedies without access to effective judicial review cannot be deemed to constitute adequate redress in the context of Article 14."¹¹ In a case of torture, when an administrative judge or a disciplinary institution simply slaps the perpetrator on the wrist, without ordering punishment, and without providing adequate measures of redress for the victim, they have not satisfied Convention obligations. Adequate domestic procedures, including access to full and effective redress, are necessary and this requirement is clarified by the Committee's jurisprudence on Article 14.¹²

CONCLUSION

Full information on redress and rehabilitation is very important to determine whether there has been compliance with Convention obligations. For instance, after consideration of the fourth periodic report of Belarus, the Committee concluded that "the State party should provide redress and compensation, including rehabilitation to victims in practice, and provide information on such cases to the Committee. Furthermore, the State party should provide information on redress and compensation measures ordered by the courts and provided to victims of torture or their families. This information should include the number of requests made and those granted, and the amounts ordered and actually provided in each case."¹³ Repetition of legal texts will not satisfy the Committee; what happens in practice is critical. To that end, State Parties should provide relevant statistical data to the Committee.

Training on Convention obligations is an obvious need and the Istanbul Protocol is an invaluable training tool, which is recognized in General Comment No. 3. The Istanbul Protocol provides guidance for medical doctors and lawyers in sensitive matters including, *inter alia*, how to question a victim of torture and interact with those involved, how to record facts, and how to meet the psychological needs of victims.¹⁴ The Istanbul Protocol also functions in a preventative role by educating people, *inter alia*, regarding the importance of the use of cameras, the registration of prisoners, and ensuring access to doctors and to lawyers. All of these measures contribute to the realization of the object and purpose of the Convention and their value is affirmed in General Comment No. 3.

Under the law, the prisoner is sacred; certainly a prisoner might be guilty and should be punished in accordance with the law if he or she committed a crime, but the law condemns and rejects torture and ill-treatment of that prisoner. The use of torture and ill-treatment sometimes gives a false sense of security and distorts the real possibility of achieving justice. We must ensure that neither innocent people nor guilty people are tortured, and that no one's rights are violated. General Comment No. 3 contributes a valuable tool to reaffirm and assert these essential principles.

Remarks of Octavio Amezcua*

INTRODUCTION

I think it is a very good sign that the Committee against Torture is starting to pay more attention to the issue of reparations. As a human rights lawyer in the Latin American forum, I have witnessed how NGOs have focused litigation in

the Inter-American System. Definitely, one of the reasons for this preference is that it is important that the System, particularly the Inter-American Court of Human Rights, has given reparations. Dealing with reparations gives a chance to the UN committees to address human rights violations in a more comprehensive way. The adoption of criteria established in General Comment 3¹⁵ is a good starting point for the Committee [against Torture] to start exploring reparations measures within its individual complaint procedure.

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I think General Comment 3 represents the opportunity for the Committee to expand its decisions on individual complaints in order to determine reparation measures required by the case in accordance with a UN instrument and the jurisprudence of international bodies, such as the Inter-American Court of Human Rights. It will be very important for other UN bodies and NGOs to strongly support this process because at the beginning it will undoubtedly face resistance by states that have accepted the individual complaint mechanisms. The Committee against Torture and other UN committees will face claims by states regarding the powers of those bodies to award reparations in such a detailed way, claims that might be based on the quasi-judicial nature of the committees. However, the award of reparations should be conceived as implicit within the adjudication powers that treaties confer to the committees regardless of their quasi-judicial nature. This means that as long as the committee has powers upon a particular case of human rights violations, it also implicitly has the power to award particular reparation measures. Thus, the Committee [against Torture] has the possibility of addressing reparations in a way far beyond what it has previously adopted in the past. This is in accordance with its mandate for individual complaints and with what the Committee itself has determined in General Comment 3, which it recently adopted.

THE NEED FOR IMPROVEMENTS TO COMMITTEE PROCEDURE

However, there need to be several changes in the Committee's procedure for resolving individual complaints in order to deal effectively with reparation measures. The one I think is the most important is the one regarding the victims' point of view as the basis for awarding reparation measures. These measures cannot be filled without considering the victims' perspective. Particular measures of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition are created in accordance with the victims' needs—something that the Committee cannot address by only measuring the damage caused by the violation in abstract. Each victim suffers the consequences of gross human rights violations such as torture in very different ways. Therefore, the Committee should take into account this objective

basis in order to award reparations in a particular case. In this regard the Committee clearly states in General Comment 3, I quote, "the importance of the victim participation in the redress process, and that the restoration of the dignity of the victim is the ultimate objective of the provision of redress."¹⁶ Not listening to the victims' needs can be very counterproductive for the implementation of reparation measures. And here I would like to mention, well actually a very sad example is, you know, Mexico is currently facing a huge tragedy caused by the violence of organized crime but also the response of the state to that violence. It has caused more than 100,000 killings, around 30,000 people disappeared, other thousands of people tortured. As part of this tragedy, a couple of years ago a big group of victims organized and started pressing the government to negotiate some reparation measures and what to do in this situation. This process had some very interesting results actually. The Victims Law,¹⁷ which deals in a very progressive way with the issue of reparations, was a product of these negotiations.

But also another issue that was treated by these negotiations was the building of a victims' memorial to the victims of the violence of these last years. But what happened basically is that the negotiations stopped at that point and suddenly the federal government publically announced the building of a victims' memorial. They built it in a place that is by the main military base in Mexico, which for many victims was considered an offense because the military actually is one of the main actors in this tragedy, one of the main responsible for this situation. But the main problem is that this memorial was built without previous consultation with the victims about what kind of memorial they wanted. So, many victims took this as an offense and it was actually counterproductive, had no reparation really at all. And of course this profoundly affected the dialogue between government and victims and so this is something the Committee would like to avoid when issuing reparation measures.

The way to avoid it is by listening to victims' needs, therefore awarding concrete measures based on those needs. The Committee against Torture's Rules and Procedures¹⁸ somewhat already provide a solution for this. Rule 117 says that the Committee may hold closed meetings in order to provide further clarification. Regarding these "further clarifications," I would like to recall a very interesting article published in *SUR Journal* a couple of years ago. The article is about the compliance with the Inter-American Court's rulings and one of the very interesting findings of this article is that the more detailed the reparation measure is, the more the chances that the state will comply with that measure. Like for example if, as the Court has repeatedly stated, it orders the state to conduct a serious investigation to punish the perpetrators. Well, that's a very open statement; it leaves to the state all the means to comply with this order. And, well, we know that states are not enthusiastic about complying with international bodies' resolutions. I mean, it has no instructions for the state to comply with these measures. So, it's very different from telling the state you should conduct an investigation by applying the Istanbul Protocol, this and that, so that's a better way to follow up the decision.

By applying these criteria to the Committee's decision, we can conclude that the formula contained in the Convention against Torture¹⁹ is the right to redress and an enforceable right to fair and adequate reparation. Let's say a formula for issuing some concrete reparation measures in a particular case is that it is vague to just leave to the State Party the means to comply with the decision. Also, taking the risk of implementing measures might be contrary to the victims' needs. By issuing particular reparation measures, the Committee would be able to control the implementation of its decisions through its follow-up mechanisms that would eventually make the individual complaint procedures a much more effective litigation tool, answer questions on the merits of the complaint. Now the way these hearings are held should be flexible enough as to allow the Committee to listen to victims' needs. Of course not every victim has the chance to travel to Switzerland, so the Committee should be flexible enough to allow hearings in other parts of the world, maybe held by a Committee's working group or by holding meetings with the use of technology. Well, the option of General Comment 3 on the purpose of dealing in a better way with reparations should lead the Committee to the issuance of detailed reparation measures. These would not only be translated into a better quality of the Committee's decisions but also into their effectiveness, as I will further explain.

IMPLEMENTATION PROCEDURES

In this regard, it is also worth mentioning that the Committee already has the tools for an effective follow-up procedure of its decisions—tools that other relevant international human rights bodies lack. And I would like to mention here, for example, the case of the Inter-American Court [of Human Rights]; one of the weak points of the system is precisely the follow-up mechanism of the Court's resolutions. As you know, every now and then the Court dictates a compliance resolution, holds meetings with victims and representatives, but under no clear criteria for advocates. On the other hand, the Committee's Rules of Procedure establish in Rule 120²⁰ a follow-up rapporteur-based mechanism that could periodically check the compliance with particular reparation measures as ordered by the Committee in a particular decision. Also the Committee could take advantage of its constant dialogue with States Parties in periodic reviews in order to hold special meetings with state representatives for the follow-up of decisions, and in particular, with the compliance with reparation measures.

In order to issue particular measures, the Committee should first have a holistic approach to these measures, considering that most of the time, reparation measures have no meaning for the victim within the context of redress unless the Committee has a comprehensive approach to these measures. Thus, for example, the compensation received is frequently viewed as actually being offensive by the victims in cases where the state hasn't punished the perpetrators or even started a serious investigation of the facts. Also, medical assistance could be deprived of its reparation potential in cases where the state hasn't publicly recognized its responsibility for the human rights violations. Also other things

should be taken into account by the Committee, especially when dealing with torture cases. An important principle in reparations is the causality principle, which states that the responsible state is only allowed to redress those damages that are directly caused by the violation of international law. However, in cases involving gross violations of human rights, such as torture, the causality principle should be understood as flexible enough as to encompass all the serious consequences of atrocities such as torture.

Torture victims, as a lot of you should know, are frequently left with permanent damages as a product of the trauma experienced by torture. And in these cases, the Committee should use concepts already explored by other international bodies such as life, land, or lost opportunities in order to ensure that the damage caused by torture will be fully repaired.

Having said that, for analytic purposes, reparation measures can be broken down into five categories, as explained by the commentary in General Comment 3,²¹ in accordance with international law. First there is restitution, which is aimed at restoring the situation to prior to when the violation took place. Of course this measure might be very difficult in cases involving gross human rights violations, such as torture, where the damage inflicted might be permanent. But it also involves other kinds of measures that are frequently very important for victims and for example, victims who are imprisoned as part of criminal proceedings, but on the basis of self-incriminating evidence obtained through torture. And of course there arise a lot of difficulties for the international bodies to ensure compliance with the measures, such as for *habeas corpus* petitions, because it depends on the domestic court's ruling on a particular criminal proceeding. And it will be, I will assume, that the domestic courts will be very reluctant to comply with this kind of order.

Second, compensation is a way of redressing all material and non-material damages through monetary means and it all encompasses actual losses and future losses, a measure that is very important regarding lost opportunities for torture victims. Third, rehabilitation measures, not only understood as medical and psychological services, but also other kinds of social services and legal services. These are measures aimed to fully give back to the victim the possibility of living a normal life in his or her particular social context. Fourth, satisfaction measures—very important in international human rights law—which are aimed at restoring the victim's dignity and include very important measures, such as the full disclosure of truth and investigation and punishment for perpetrators, that are by themselves natural consequences of the human rights violations but have a very important reparation value for victims. Fifth, and finally, the guarantees of non-repetition, which includes, I will say, the most ambitious reparation measures that can be issued. They include new legislation—the issuance of new legislation and reform to states' institutions. Actually, there are good experiences with other UN committees. The [Committee on the Elimination of Discrimination against Women] has issued very interesting guarantees on non-repetition, for example, in cases regarding domestic violence. It has ordered the state to build, for example,

shelters for women who have been victims of sexual assault by their partners. And, of course, these measures are very difficult to follow up. Although the Committee [against Torture] also has the tools to facilitate this follow up through its periodic review, usually the Committee deals with this subject in particular with its recommendations, which usually can be conceived of as guarantees for non-repetition for a particular case. So the Committee could take advantage of this situation and already deal with these guarantees in the periodic review procedure.

Also, other things that should be taken into account by the Committee, especially in taking into account torture cases, are procedural issues, which should be taken into account when deciding which reparation measures should be awarded, regarding the burden of proof and the possibility for victims to prove before the Committee the damage he or she has suffered. I say this considering the limitations that victims and representatives have, gathering all of the evidence for this. In this regard, victims and representatives are confronted with the state on an equal basis. Thus, the Committee should have a flexible approach

toward this situation, allowing presumption and circumstantial evidence for the issuance of reparation measures.

CONCLUSION

Finally, I would like to emphasize the importance of the recognition of victims' groups in the Committee's decisions. Serious violations such as torture have such a strong impact in that they not only affect the direct victim but generally their next of kin, as Dean Grossman mentioned. The struggle for achieving justice in which many times next of kin actively participate, frequently leaves entire families with significant material losses and emotional exhaustion. These effects should be taken into account by the Committee when issuing remedies for these indirect and direct victims. The Committee faces great challenges with these issues. However, reparations are fundamental if we want the individual complaint mechanism to be an effective litigation tool. Behind every human rights violation, particularly in torture cases, there is a human tragedy that needs to be confronted and suffering that needs to be repaired. It is tough, but I think victims deserve it.

Endnotes: Panel II

¹ UN Comm. against Torture, General Comment 3, U.N. Doc. No. CAT/C/GC/3 (2012).

² *Id.* at ¶ 2.

³ *Id.* at ¶ 10.

⁴ *Id.* at ¶ 23.

⁵ *Id.* at ¶ 32.

⁶ *Id.* at ¶¶ 4, 18.

⁷ Gerasimov v. Kazakhstan, U.N. Comm. against Torture, CAT/C/48/D/433/2010 (May 24, 2012) available at http://www2.ohchr.org/english/bodies/cat/docs/jurisprudence/CAT-C-48-D-433-2010_en.pdf.

⁸ *Id.* at ¶ 11.2.

⁹ *Id.* at 12.8.

¹⁰ *Id.*

¹¹ *Id.*

¹² Gen. Comm. 3, *supra*, note 1.

¹³ U.N. Comm. against Torture, Concluding Observations, Belarus, U.N. Doc. No. CAT/C/BLR/CO/4 (2011) ¶ 24 available at http://www2.ohchr.org/english/bodies/cat/docs/co/CAT.C.BLR.CO.4_en.pdf.

¹⁴ U.N. Office of the High Comm'r for Human Rights, *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol)*, 2004, HR/P/PT/8/Rev.1, available at <http://www.unhcr.org/refworld/docid/4638aca62.html>.

¹⁵ U.N. C.A.T., Implementation of Article 14 by States Parties, U.N. C.A.T. General Comment 3, U.N. Doc. CAT/C/G/C/3 (2012), available at <http://www2.ohchr.org/english/bodies/cat/GC3.htm>.

¹⁶ *Id.*, at ¶ 4.

¹⁷ Ley General de Víctimas, Diario Oficial de la Federación [DO], 9 enero 2013.

¹⁸ U.N. C.A.T., Rules of Procedure, U.N. Doc. CAT/C/3/Rev.4 (Aug. 9, 2002), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=1&DocTypeID=65.

¹⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

²⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Rules of Procedure, Rule 120, CAT/C/3/Rev.5 (Feb. 2011).

²¹ General Comment 3, *supra* note 1.